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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AMANDA JEAN MEEK MIZE, Defendant and Appellant.	E047774 (Super.Ct.No. BAF006181) **OPINION**

APPEAL from the Superior Court of Riverside County. Jorge C. Hernandez, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton, Michael T. Murphy, and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

In November, 2007, defendant pleaded guilty to possession of methamphetamine and being in possession of a loaded firearm that was not registered to her and was placed on probation (case No. BAF005763). Nine months later, defendant was charged with burglary of a home in Calimesa (case No. BAF006181), from which the firearm had been taken. She moved to dismiss the second complaint on the ground that the possession of the loaded firearm and the burglary were all part of a continuous course of conduct and should have been prosecuted together. The motion was denied. Defendant then pleaded guilty to first degree burglary.

Defendant makes one claim on appeal: Her burglary prosecution in the instant case was barred by Penal Code section 654 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*) because the People were aware of defendant's involvement in the burglary at the time she was prosecuted in 2007 in case No. BAF005763, and the crimes were part of the same course of conduct.

We find that the burglary prosecution was not barred by Penal Code section 654 or *Kellet* as it was a separate, distinct crime that was not part of a continuous course of conduct with the possession of a loaded firearm charge. We affirm the judgment.

I

PROCEDURAL BACKGROUND

On November 13, 2007, after a complaint was filed on October 29, 2007, by the Riverside County District Attorney's Office, defendant pleaded guilty to one count of violating Health and Safety Code section 11377, subdivision (a), possession of methamphetamine, and one count of violating Penal Code section 12031, subdivision

(a)(2)(F),[1] carrying a loaded firearm in a vehicle or public place when not the registered owner, in case No. BAF005763.[2] Defendant was not charged with burglary (§ 459) despite the fact the police report stated that the loaded firearm was stolen during a residential burglary in Calimesa. Defendant was placed on probation.

On August 18, 2008, a felony complaint was filed against defendant in case No. BAF006181 for one count of burglary (§ 459) committed on September 27, 2007. In addition, it was alleged that defendant had violated her probation in case No. BAF005763.

After her motion to dismiss the case was denied, defendant withdrew her not guilty plea and, after having waived her rights, pleaded guilty to one count of first degree burglary. Defendant waived a presentence probation report and was immediately sentenced. Execution of a two-year state prison sentence was suspended, and defendant was sentenced to three years' probation, with 120 days to be served in a weekend jail program. The alleged probation violation was dismissed. Defendant then requested a certificate of probable cause from the denial of the *Kellett* motion, which was granted.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The complaint additionally charged misdemeanor violations of Business and Professions Code section 4140, for possession of a hypodermic needle and syringe, and Health and Safety Code section 11550, subdivision (a), for being under the influence of a controlled substance. All the offenses were alleged to have occurred on September 28, 2007.

II

FACTUAL BACKGROUND[3]

On September 27, 2007, Travis Rollf, who lived at 931 Grant Street in Calimesa, left his residence at approximately 3:15 p.m. He left his front door unlocked. He returned at 4:30 p.m. and discovered that his MP3 player and laptop computer had been taken from his kitchen and that three firearms he kept in his bedroom were missing. Since the home was not ransacked, Rollf believed the person who took the items had previously been in his residence.

On September 28, 2007, Banning Police Officer Everett Babcock responded to a call of a disturbance in front of a residence located at 1285 South Hargrave Avenue in Banning. Upon arriving, Officer Babcock found Daniel Waterman sitting in his pickup truck and defendant in the backseat. Monica Romero was leaning in the driver's side window speaking with Waterman. Romero lived at the residence and was intoxicated.

Officer Babcock spoke with Waterman. He observed a wad of money balled up in Waterman's fist, which he suspected was for the purchase of drugs. Waterman showed signs of being under the influence of alcohol or drugs, so Officer Babcock ordered him out of the truck. Waterman told the officer that defendant had called him that night to

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[3] Since defendant pleaded guilty in both cases, there was no preliminary hearing or trial. Further, she waived a probation report in the instant case. As such, the statement of facts is drawn from the police reports filed with this court as "confidential -- police report," from which both parties have taken their statements of fact.

pick her up at Romero's house. When he arrived, he went inside Romero's trailer while defendant loaded her belongings into the truck.

Defendant was also ordered out of the truck. Officer Babcock looked into the truck and observed a nine-millimeter handgun on the floorboard in front of the driver's seat. There was a round in the chamber and a full magazine holding 15 rounds. Defendant immediately advised Officer Babcock, "That's my gun" and said she had put it into the truck without Waterman's knowledge. Defendant's handbag was also recovered from the truck. Inside, Officer Babcock found a syringe containing methamphetamine and ammunition for a Winchester .38 Special handgun.

Defendant told Officer Babcock that the nine-millimeter handgun belonged to a friend who lived in Yucaipa. Waterman had no knowledge of the handgun; she had put it in the truck. She did not know that it was loaded. Defendant admitted to using methamphetamine. Officer Babcock later determined that the loaded handgun found in the truck was stolen during the burglary at the Calimesa home.

On October 2, 2007, defendant came back to the Banning police station and asked to speak with Officer Babcock. Officer Babcock told defendant that he knew about the burglary at the Calimesa house, and she admitted her involvement. She told him that she had hidden the other two firearms taken from the Calimesa house in a vacant house. Defendant was released and never taken into custody for the residential burglary.

III

DENIAL OF *KELLETT* MOTION

Defendant contends that the trial court erred by denying her motion to dismiss under *Kellett* and section 654, because the People were well aware of the burglary when she was charged in case No. BAF005763 for possession of a loaded firearm, and the instant charge of burglary arose out of the same course of conduct as that to which she had already pleaded guilty and been placed on probation.

A. *Additional Factual Background*

Defendant filed a written motion to dismiss the instant charges pursuant to section 654 and *Kellett*. Defendant argued that the People were harassing her by "alleging different and additional charges arising out of the same course of conduct. . . ." Defendant attached the police reports from both incidents to the motion. The People filed opposition. They contended that the two crimes -- burglary and possession of a loaded firearm -- occurred at different times and places and did not constitute one course of conduct.

The motion was argued on November 13, 2008. Defendant argued that the burglary occurred one day prior to the events that led to the charge of carrying a loaded firearm, and, according to the police report, it was determined that the loaded firearm had been taken during the burglary of the Calimesa residence. The trial court initially stated there were no common elements of the offenses that would bar dual prosecution under section 654.

Defendant argued that this was a continuous course of conduct and that there was sufficient evidence of the burglary to file it with the loaded firearm charges. The trial court questioned whether the People had had enough evidence of the burglary at the time they filed the loaded firearm charge. Defendant responded that the purpose of *Kellett* was to avoid harassment in the form of ongoing prosecutions for the same course of conduct.

The People argued that this was not a continuous course of conduct. There was a break between the burglary and the possession of the gun with the methamphetamine. Defendant responded that she had relied on the fact that she would not be prosecuted for the burglary when she pleaded guilty in the first case. The trial court felt this was grounds to withdraw the plea but not a bar to subsequent prosecution for the burglary.

The trial court denied the motion, finding there were no common elements to the crimes, and it was not the same course of conduct.

B. *Analysis*

Section 654, subdivision (a) prohibits both multiple punishment and multiple prosecution, providing in pertinent part as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." The prohibition against multiple punishment ensures that a defendant's punishment is commensurate with his or her criminal liability whereas the proscription

against multiple prosecution protects against needless harassment and the waste of public funds. (*Kellett, supra,* 63 Cal.2d at p. 827.)

Kellett is the leading case on the application of the statute's bar of multiple prosecutions under section 654. In *Kellett*, the defendant was standing on a sidewalk holding a pistol. He pleaded guilty to exhibiting a firearm in a threatening manner. Defendant was later charged with possessing a concealable weapon by a felon based on the same facts. (*Kellett, supra*, 63 Cal.2d at p. 824.) The court stated, "When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Id*. at p. 827, fn. omitted.)

However, "*Kellett* does not require, nor do the cases construing it, that offenses committed at *different times and at different places* must be prosecuted in a single proceeding." (*People v. Cuevas* (1996) 51 Cal.App.4th 620, 624.)

The burglary committed in Calimesa on September 27 and the possession of a loaded firearm on September 28 were distinct acts that did not constitute the same course of conduct. Defendant went to the Calimesa house on September 27 and took several items, including three firearms and a laptop computer. She hid two of the guns and kept one. The following day, she was caught with that firearm, which was loaded, while presumably with Waterman at Romero's house to obtain methamphetamine. These were

completely separate acts that were only linked by the fact that the gun in defendant's possession was taken during the burglary. They were committed in separate places and constituted distinct acts neither relying on the other to obtain a conviction.

In *People v. Flint* (1975) 51 Cal.App.3d 333, the court analyzed the application of section 654 and *Kellett* under a totality of the facts test. It stated, "Neither the purpose of the rule -- prevention of needless harassment and waste of public funds [--] nor the criterion for its applicability -- whether the same act or course of conduct plays 'a significant part' with respect to each crime - suggests that its applicability in a particular case depends on abstract definitions of the elements of the respective crimes or on the precise moment when, as a matter of law, one crime was completed. What matters, rather, is the totality of the facts, examined in light of the legislative goals of sections 654 and 954,[4] as explained in *Kellett*." (*Flint*, at p. 336, fn. omitted.) The *Flint* court found that if the evidence needed to prove one offense necessarily supplies proof of the other, the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds. (*Id*. at p. 338.)

This "totality of facts" analysis was utilized in *People v.* Martin (1980) 111 Cal.App.3d 973, 977 (*Martin*). In *Martin*, defendant was found in possession of marijuana and a sawed-off shotgun after a lawful traffic stop. After the defendant was

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4 Section 954 provides in part, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."

arrested, a check on the shotgun was run by the arresting deputy and was found to have been stolen. (*Id.* at p. 976.) The defendant was charged and pleaded guilty to narcotics offenses and misdemeanor possession of the shotgun. (*Ibid*.) Subsequently, an information was filed charging him with burglary, and he was found guilty during a court trial. (*Id.* at pp. 975-976.)

On appeal, the court found the bar against multiple prosecutions did not apply when the defendant was prosecuted for possessing a sawed-off shotgun that had been taken in a burglary and later prosecuted for the burglary itself. (*Martin*, *supra*, 111 Cal.App.3d at pp. 977-978.) The court explained that, as to the burglary charge, evidence was presented of a forced entry of the victim's home and the removal of several items, including a shotgun, which was subsequently found in the defendant's possession. "Evidence was also presented of appellant's presence at the home at the time of the burglary. The shotgun offense would have been supported simply by evidence of appellant's possession of a sawed-off shotgun, without regard to where he had acquired it. Evidence in the two cases, therefore, was for the most part mutually exclusive, the only common ground being the fact that the sawed-off shotgun found in appellant's possession had been taken in the burglary committed a week earlier. Under these circumstances, this minimal overlap in the evidence did not require a joinder of these cases." (*Id.* at p. 978.)

Applying *Flint's* evidentiary standard here, the evidence supporting the guilty plea of possession of a loaded firearm was simply that she possessed a firearm not belonging to her. On the other hand, the evidence necessary to prove the burglary would require a

showing of unlawful entry into the Calimesa home with an intent to commit a felony therein (see § 459). Only a "minimal overlap in the evidence" is present here, as possession of a firearm that had been stolen during the burglary could be somewhat relevant to show that she was not the registered owner of the gun, and vice versa (possession of the firearm stolen during the burglary) to show that she was the perpetrator of the burglary. (See *Martin, supra,* 111 Cal.App.3d at p. 978.) However, neither the elements of the crimes nor the evidence required to prove the crimes were the same.

Further, although the burglary was referred to in the police report prepared in case No. BAF005763, there was no evidence presented that the People had had sufficient evidence to begin prosecution of the burglary. In fact, in the police report regarding the burglary, it was noted that "[t]his case will be left open and continued to the Cabazon Investigators for follow-up with Daniel Waterman and [defendant] reference involvement and locating additional stolen property. A copy of this report will also be forwarded to Banning Police Department for Officer Babcock." Although the People might have been aware of the burglary at the time of the prosecution for possession of the firearm, it is unclear that it could have proceeded on the charges; nothing in section 654 bars the prosecution for burglary, since it was a distinct act and based on different facts and evidence.

Defendant relies on several cases -- *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, *In re Johnny V.* (1978) 85 Cal.App.3d 120, and *In re Benny G.* (1972) 24 Cal.App.3d 371 -- to support that she could not be charged with burglary after she pleaded guilty to possession of a loaded firearm. In those cases, the defendants were

charged with and convicted of an offense, that offense was reversed on appeal, and the question was whether section 654 barred them from being charged with a related offense for the *same act*. (See *Sanders*, at pp. 612, 616-617 [after reversal of conviction on 10 counts of grand theft of real property cannot file new case charging forgery and filing false documents when based on the same acts]; *Johnny V.*, at pp. 138-139, 141-142 [prosecutor could not charge defendant with assault with a deadly weapon after his being acquitted of murder charge on the same act]; *Benny G.*, at pp. 373-374, 376-377 [could not be charged with accessory to robbery when acquitted of same robbery]). Here, defendant engaged in a burglary that was completed on September 27. The following day, she was involved in a disturbance that led to her being charged with possession of a loaded firearm. The charged crimes in the two cases were not part of a continuous course of conduct and certainly did not arise from the same acts. As such, defendant's cited cases do not apply here.

Further, defendant argues that the evidence of the burglary is based on the "identical evidence that gave rise to the original firearm possession charge" and that "[t]he burglary and possession of items stolen during that crime played a significant role in the first case against appellant." We disagree. Defendant pled guilty to possession of a loaded firearm in the first case. She stated to police at the scene that the firearm belonged to her and that she got it from a friend in Yucaipa. The facts of the burglary had no relevance to her possession of a loaded firearm. We might have agreed with defendant if she had pleaded guilty to possession of stolen property, but that is not what

occurred here. A prosecution for the burglary, as stated, *ante*, would be based on different facts and evidence.

We conclude that the burglary and possession of a loaded firearm were not part of a continuous course of conduct requiring that they be joined together for prosecution. Accordingly, the trial court properly denied defendant's *Kellett* motion.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P.J.

We concur:

GAUT
J.

KING
J.